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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT RICHLAND

UNITED STATES OF AMERICA, Plaintiff, v. MISSION SUPPORT ALLIANCE, LLC, LOCKHEED MARTIN SERVICES, INC., LOCKHEED MARTIN CORPORATION, and JORGE FRANCISCO "FRANK" ARMIJO, Defendants.	No. 4:19-cv-05021 LOCKHEED MARTIN CORPORATION'S AND LOCKHEED MARTIN SERVICES, INC.'S MOTION TO DISMISS 10/03/2019 @ 10:00 am Oral Argument Requested

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Pursuant to Rules 8, 9, and 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Lockheed Martin Corporation and Lockheed Martin Services, Inc. move to dismiss the United States of America's claims under the False Claims Act (Counts I and II) and Anti-Kickback-Act (Count III) in the United States' Complaint. The accompanying Memorandum sets forth support for this motion.

Dated: April 23, 2019

Respectfully submitted,

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I. PRELIMINARY STATEMENT

The Court must dismiss the government's contrived Anti-Kickback Act ("AKA") claim and vague theories of False Claims Act ("FCA") liability because they are inadequately pled and contrary to precedent, statutory intent, and public policy. This case arises from contracts at the Department of Energy ("DOE") Hanford facility between Mission Support Alliance (MSA)—a joint venture in which Lockheed Martin Corporation ("LMC") held an interest—and Lockheed Martin Services, Inc. ("LMSI"), the longstanding information technology ("IT") provider at Hanford. In 2009, DOE competitively awarded a newly-created prime contract to MSA, knowing that MSA's proposal included an LMSI subcontract for the continued provision of IT services. When DOE later consented to the LMSI subcontract, it was well-aware that MSA and LMSI shared LMC as a common parent and that LMC had "seconded" several employees to MSA to help run the joint venture. It also knew that LMSI proposed commercial fixed prices and fixed rates, which always carry the possibility of profit. The government nevertheless now contends that Defendants committed fraud because LMSI profited and attempts to paint the standard compensation LMC paid to its seconded employees as kickbacks.

The government's AKA claim is not legally sustainable. It misconstrues the text and purpose of the AKA and ignores controlling Supreme Court precedent. According to the government, LMC paid kickbacks to seconded employees when it compensated them under its customary, publicly available, performance-based compensation plan. But Congress's intent in enacting the AKA

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was to prohibit "commercial bribes" exchanged between two independent and unaffiliated actors, not compensation paid by a company to its employees. The Supreme Court echoed this Congressional intent in *Skilling v. United States*, holding that corporate incentive compensation is not a kickback or bribe because it does not involve a transaction with a third party. 561 U.S. 358, 413 (2010). Additionally, the intra-corporate conspiracy doctrine, which legally precludes a conspiracy among affiliates or their employees, and the rule of lenity, which requires that the public receive fair warning that conduct is illegal, also compel dismissal of the government's AKA count. Finally, even if a company could pay a kickback to its own employees, the government fails to plead facts that establish a plausible or particular AKA claim.

The government's FCA claims are *post hoc*, outcome-driven, and have not been pled with the particularity required by Fed. R. Civ. P. 9(b). The FCA allegations center on whether and to what extent LMSI was entitled to earn profit. The government concedes that LMSI and MSA repeatedly identified a valid contractual and regulatory basis supporting LMSI's ability to earn profit. Compl., ECF No. 1, ¶¶ 64, 75. This concession precludes any straightforward pricing claim, and the government does not allege that DOE or anyone else had a problem with the quality of LMSI's services. Instead, ten years after the prime contract award, the government makes a hodgepodge of disjointed and confusing FCA allegations unified only by the assertion that LMSI made *too much* profit. As MSA's motion to dismiss explains, the government fails to plead the required elements of scienter and materiality for any of its FCA claims. For efficiency, this

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motion focuses on two of the government's FCA theories—(1) that LMSI made misrepresentations about an unspecified number of unspecified services and materials, and (2) that LMSI's price inflation on some unspecified tasks led to unspecified false statements by unnamed people at unidentified times. Both of these theories fall far short of the Fed. R. Civ. P. 9(b) pleading standard.

II. FACTUAL BACKGROUND

A. Background on the Relevant Contracts and the Relationships Among Defendants.

In May 2007, DOE issued a Request for Proposals ("RFP") for a Hanford infrastructure support services prime contract known as the Mission Support Contract ("MSC"). Compl. ¶ 35. LMC formed MSA to compete for the MSC, *id.* ¶ 40, and throughout the relevant period, LMC was one of three MSA members. *Id.* ¶ 8. As part of its proposal, MSA identified LMSI as the subcontractor responsible for the IT, or Information Resources/Content Management ("IR/CM"), scope of work. *Id.* ¶ 43. DOE awarded the MSC to MSA in April 2009. *Id.* ¶ 48.

The government affirmatively describes LMC, LMSI, and MSA as affiliates, *id.* ¶¶ 42, 117, 124, and notes that DOE was aware of and focused on these affiliations throughout the relevant period, *id.* ¶¶ 39, 64, 83. This alleged affiliate relationship is essential to the government's position that LMSI was not permitted to profit; at the same time, it makes the kickbacks the government alleges a legal impossibility.

Both DOE's RFP and Clause B.11 of the MSC specifically exempt commercial items and services from a prohibition on "subcontractor fee" for prime

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contractor affiliates. *Id.* ¶ 37 (citing Clause B.11).[1] The Complaint acknowledges that MSA and LMSI repeatedly identified the LMSI subcontract as commercial and pointed to commerciality as an applicable exception in Clause B.11.[2] *See, e.g.*, *id.* ¶¶ 37, 64, 75. It also acknowledges that MSA and LMSI cited to LMSI's General Services Administration ("GSA") Schedule[3] and LMSI's work for

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[1] Although neither the Complaint nor Clause B.11 defines "affiliate," the Federal Acquisition Regulation ("FAR") states that an "affiliate" includes any "associated business concerns or individuals if, directly or indirectly (1) [e]ither one controls or can control the other; or (2) [a] third party controls or can control both." 48 C.F.R. § 2.1.

[2] Clause B.11 incorporated the FAR's definitions of commercial items and services. *Id.* ¶ 37. Generally, a commercial item is an item "of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes" that has been (1) "sold, leased, or licensed to the general public," or (2) "offered for sale, lease, or license to the general public." 48 C.F.R. § 2.1. Commercial services are those "of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions." *Id.*

[3] The GSA Schedule program "provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services." *MSC Indus. Direct Co. v. United States*, 126 Fed. Cl. 525, 528 (2016); *see also CGI Fed., Inc.*

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commercial (*i.e.*, non-government) customers as evidence that LMSI's services were commercial. *See, e.g., id.* ¶ 111.

After the MSC award, MSA, LMSI, and DOE negotiated the terms of the IR/CM subcontract for approximately 18 months. *See generally id.* ¶¶ 52-113. DOE conditionally consented to the subcontract in February 2011. *Id.* ¶ 114. The final subcontract included three types of pricing: (1) fixed prices, which the government describes as "an agreed upon total price that is not subject to any adjustment based on the contractor's costs incurred while performing the contract"; (2) fixed unit rates, which the government describes as "a contract based on estimated quantities of items and agreed upon unit rates, including labor rates"; and (3) time and materials, which the government describes as "a contract used to acquire goods or services on the basis of direct labor hours at a specified fixed hourly rate with goods/materials priced at cost plus, potentially, material handling costs." *Id.* ¶¶ 26, 60. The possibility of profit is permissible—and inherent—with each of these pricing approaches. *See* 48 C.F.R. § 16.202-1 (fixed pricing "places upon the contractor maximum risk and full responsibility for all … resulting profit or loss"); § 16.601(c)(2) (time and materials pricing includes "fixed hourly rates that include wages, overhead, general and administrative expenses, and profit").

B. Background Relevant to the Government's AKA Claims.

The government alleges that LMC paid kickbacks to LMC employees

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v. United States, 779 F.3d 1346, 1352 (Fed. Cir. 2015) (explaining that supplies sold through the GSA Schedule program are commercial).

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"seconded" to MSA, but it does not allege that any payments to the seconded employees were under-the-table, provided by third parties, or outside the normal course of business. Instead, the government asserts that LMC used its Management Incentive Compensation Program ("MICP") to reward seconded employees for helping "to enhance LMSI and LMC's bottom line through the LMSI subcontract to MSA." Compl. ¶ 123. In its Motion Requesting Judicial Notice, ECF No. 36, LMC seeks judicial notice that: (1) from 2009–2016, LMC had a publicly disclosed MICP plan (the "Plan"); (2) a stated purpose of the Plan was to "[e]stablish performance goals within the meaning of Section 162(m) of the Internal Revenue Code;" (3) the Plan states that it was open only to LMC employees; and (4) the Plan provided a formula to determine MICP payments that accounted for individual and organizational performance. The government does not allege that the Plan violated applicable regulations or that LMC deviated from the Plan terms in awarding the MICP payments at issue.

The Complaint does not define "secondment," which typically involves one company in a corporate family assigning an employee to an affiliated company while continuing to maintain responsibility for the employee's salary and benefits. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 649 (S.D.N.Y. 2006) (explaining that "secondment" refers to the assignment of an employee to an affiliated company). As the government itself has noted elsewhere, it is both common and beneficial for DOE prime contractors to use "loaned" employees from their owners and affiliates. *See United States v. Savannah River Nuclear Sols., LLC*, No. 1:16-cv-00825-JMC, 2016 U.S. Dist.

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LEXIS 168067, at *4 (D.S.C. Dec. 6, 2016) (citing the government's complaint for the proposition that the use of loaned employees from a corporate parent is a permissible way for prime contractors to obtain "critical skills needed in the performance of the [] contract").

LMC seconded Frank Armijo to MSA twice: first to serve as MSA's vice president for IR/CM, and later to serve as MSA's president. Compl. ¶¶ 11-12. During his second secondment, the government alleges that Armijo retained his position as an LMC vice president for IT. *Id.* ¶ 11. LMC also seconded Rich Olsen to serve as MSA's chief financial officer. *Id.* ¶ 12. The Complaint mentions two other seconded employees—Todd Eckman and David Ruscitto—but does not describe their job titles, responsibilities, actions, or the compensation they received. *Id.* ¶ 123.

C. Background Relevant to the Government's FCA Claims.[4]

The government appears to allege, with no supporting facts, that Defendants misled DOE because at least some of LMSI's services and all of its materials were not on LMSI's GSA Schedule. *Id.* ¶¶ 64, 75. It also asserts conclusory, shotgun allegations that LMSI inflated the price of unspecified fixed unit rate and fixed price tasks in the subcontract because LMSI's internal estimates called for fewer

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[4] MSA's motion to dismiss explains why the government's failure to plead the essential elements of scienter and materiality is fatal to each of its FCA claims. The Complaint also fails to state FCA claims based on two theories for the additional reasons set forth in this motion.

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employees than the estimate proposed to DOE, *id.* ¶¶ 96–98, MSA and LMSI double-billed DOE for union labor, *id.* ¶ 99, and LMSI billed for costs outside its work-scope, *id.* ¶ 100.

III. LAW AND ARGUMENT

A. The Government Must Plead with Plausibility and Particularity Under Rules 8 and 9(b).

A plaintiff asserting AKA and FCA claims must satisfy the pleading requirements of both Fed. R. Civ. P. 8 and 9(b). *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1054-55 (9th Cir. 2011) (FCA claims); *United States v. Peterson*, No. CV-11-5137-EFS, 2012 U.S. Dist. LEXIS 11838, at *5 (E.D. Wash. Feb. 1, 2012) (FCA and AKA claims). "To survive a motion to dismiss, the complaint 'must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 652 (9th Cir. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Under Rule 8, a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1179-80 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 678). To satisfy Rule 9(b), a plaintiff "must state with particularity the circumstances constituting fraud" by alleging "the who, what, when, where, and how of the misconduct charged, including what is false or misleading about a statement, and why it is false." *Id.* at 1180 (internal citations omitted). The Ninth Circuit has explained that Rule 9(b) serves two policy goals: (1) to ensure that

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defendants receive "notice of the particular misconduct … alleged … so that they can defend against the charge" and (2) "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect defendants from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Id.*

B. The Government Fails to State a Claim Under the AKA.

The government's AKA theory fails for numerous reasons. First, the Supreme Court has held that employee incentive compensation is not a kickback or bribe because it does not involve a transaction with an independent third party. Second, the AKA claim is inconsistent with the text, history, and purpose of the AKA and with the intra-corporate conspiracy doctrine, which provides that corporations cannot conspire with their own employees or affiliates. Third, because the AKA is a criminal statute, the rule of lenity requires a narrow construction to ensure that the public receives fair notice of conduct that may be criminal. Finally, the government has not met the applicable pleading standard.[5]

1. The Supreme Court has held that an employee's incentive compensation is not a kickback.

The Supreme Court has considered and rejected the government's theory that an employee's incentive compensation can constitute a "kickback." *Skilling*,

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[5] LMC and LMSI also adopt and incorporate Armijo's arguments for dismissal of the AKA claim.

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561 U.S. at 413. In *Skilling*, the government charged the defendant with committing criminal "honest services" wire fraud based on his participation in schemes to manipulate and misrepresent his employer's financial results to increase the value of his bonuses and stock options. *Id.* at 369, 413. The Court held that the honest services fraud statute, 18 U.S.C. § 1346, applies only to bribes and kickbacks, and it drew support from a comprehensive review of relevant authorities, including the AKA. *Id.* at 409, 412-13 (incorporating the AKA's definition of "kickback"). Comparing the *Skilling* allegations to a "classic kickback scheme"—in which a public official "conspire[s] with a third party" to receive a share of that third party's profits—the Court held that, as a matter of law, the government could not establish a § 1346 claim because the only payments at issue were the defendant's "salary[,] bonuses[,]" and stock options. *Id.* at 410, 413 (finding that "a reasonable limiting construction of § 1346 must exclude this amorphous category of cases") (citing *McNally v. United States*, 483 U.S. 350, 352-53 (1987)). The Court made clear that an individual must "solicit[] or accept[] side payments from a third party" to engage in a kickback or bribe. *Id.* at 413; *see also United States v. Milovanovic*, 678 F.3d 713, 721 (9th Cir. 2012) (recognizing that Skilling's "alleged misconduct entailed no bribe or kickback").

The government's AKA claim cannot survive under *Skilling*. The Complaint does not allege that Armijo—or any other seconded employee—solicited or accepted a side payment from a third party. To the contrary, here, as in *Skilling*, there is no unaffiliated third party involved with the alleged kickbacks in question. Compl. ¶¶ 11–12 (acknowledging that Armijo and Olsen were LMC

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employees); ¶ 117 (describing MSA as "LMC's affiliate"); ¶ 9 (describing LMSI as "a wholly owned subsidiary of LMC"). The government does not suggest that the purported kickback recipients were given any financial benefit beyond employee compensation. *See id.* ¶ 118 (alleging that LMC used its MICP to reward executives); ¶ 121 (identifying the alleged kickback to Armijo as "cash[,] … LMC stock[,] and other compensation [provided] through LMC's MICP"). Because the *Skilling* Court already rejected the premise that the incentive compensation a company pays its executives can constitute a bribe or kickback, the government's AKA claim must be dismissed.

2. The AKA does not apply to intra-corporate transactions.

The AKA targets "commercial bribery," which requires two independent, unaffiliated parties to exchange value to become united in a common, anti-competitive goal. Nothing in the AKA's text, legislative history, or prior application suggests that it governs the conduct alleged here. To plead a viable AKA claim, the government needed to allege that LMC and MSA were independent entities with distinct economic interests. *See United States ex rel. Patzer v. Sikorsky Aircraft Corp.*, No. 11-C-0560, 2018 U.S. Dist. LEXIS 121604, at *21-22 (E.D. Wis. July 20, 2018) (observing that the AKA requires that "each party to the kickback transaction is acting independently"). It has done the exact opposite. The government repeatedly contends that LMC, MSA, and LMSI were affiliates acting in concert. Accepting this as true for purposes of this motion, as Defendants and the Court must, this collaborative affiliate relationship renders the alleged kickbacks legally impossible. *See Doe v. Smith*, 429 F.3d 706, 708 (7th

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Cir. 2005) ("[L]itigants may plead themselves out of court by alleging facts that defeat recovery."); *see also Patzer*, No. 11-C-0560, 2018 U.S. Dist. LEXIS 121604, at *21-22 (dismissing as implausible an allegation of a kickback between affiliated prime and subcontractors).

a. The AKA targets only anti-competitive conspiracies.

The AKA defines a "kickback" as the attempted or actual solicitation or provision of something of value "to improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." 41 U.S.C. § 8701(2); *see also* 41 U.S.C. § 8702 (prohibited conduct); § 8706 (civil actions); § 8707 (criminal penalties). Congress did not define the terms "improperly" or "favorable treatment," and courts have held that the absence of statutory definitions and the general nature of these terms create ambiguity. *See, e.g.*, *United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 378 (5th Cir. 2017) (finding the definition of "kickback" to be ambiguous and applying the rule of lenity); *United States v. Burger*, No. CR 99-0439 SI, 2000 U.S. Dist. LEXIS 22066, at *15 (N.D. Cal. June 6, 2000) (same). Accordingly, courts have frequently resorted to analyzing the AKA's legislative history to discern Congress's intent. *Id.*; *see also Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011) (explaining that "clear evidence of congressional intent" in the legislative history "may illuminate ambiguous text").

The AKA's legislative history makes clear that Congress intended to target behavior that is (1) anti-competitive, and (2) conspiratorial. Congress's aim was to eliminate "commercial bribery" by prohibiting kickbacks, which "destroy

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competition." H.R. Rep. No. 99-964 at 4 (1986). The sponsor of the Senate bill that overhauled the AKA in 1986 explained that the gravamen of a kickback is the combination of two independent parties in a common course of anti-competitive conduct. *See* 132 Cong. Rec. S16307-01 (Statement of Sen. Levin) (explaining that an AKA violation requires proof of anti-competitive intent because "the Government must prove . . . that the reason one person provided something of value to another was to improperly influence a procurement decision"); *see also* H.R. Rep. No. 99-964 at 4 (1986) (noting that prosecutors often use "conspiracy statutes to prosecute persons involved in kickback schemes"); *Skilling*, 561 U.S. at 410 (describing a "classic kickback scheme" in which a procurement official "*conspired with a third party*" to share commissions (emphasis added)).

The government cites the very legislative history that precludes its kickback theory. The Complaint explains that the AKA targets anti-competitive conduct ("commercial bribery") and requires two independent parties. Compl. ¶ 17 (stating the AKA applies when "contractors or their employees provide things of value *to other contractors or their employees* in return for favorable treatment on government contracts and subcontracts" (citing H.R. Rep. No. 99-964 at 5 (1986) (emphasis added))). Though the AKA's legislative history recounts numerous examples of potential kickbacks from an extensive Senate investigation into kickbacks in government contracting, it contains no indication that Congress intended to reach employee compensation or intra-corporate transactions. *See* S. Rep. No. 99-435 at 3-7 (1986) (discussing the Senate's investigation); H.R. Rep. No. 99-964 at 5-7 (1986) (discussing the Senate's "massive investigation" and

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testimony from the Department of Defense Office of Inspector General). Rather, Congress was focused on creating incentives for companies to monitor their employees to prevent secret kickbacks—not on policing companies' internal compensation programs. *See, e.g.*, S. Rep. No. 99-435 at 2 (1986) (noting that prime contractor employees "usually" accept kickbacks and provide favorable treatment "without informing or involving their employers"); at 14 (observing that "employees … who participate in kickback schemes usually hide their illegal activities from the prime contractor").

b. The intra-corporate conspiracy doctrine applies to the AKA.

The principle that corporations cannot conspire with their employees or affiliates—known as the intra-corporate conspiracy doctrine—is widely accepted and pre-dates the 1986 amendments to the AKA. The doctrine is based, in part, on common law principles of agency. Courts have explained that a conspiracy between a corporation and its employees, or among employees of the same corporation, is legally impossible because the acts of corporate employees "are attributed to their principal," precluding "an agreement between two or more separate people." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017); *see also* S. Rep. No. 99-435, at 15 (stating in the AKA's legislative history that the "longstanding doctrine of *respondeat superior*" should apply to hold "employers responsible for the conduct of their employees").

In addition to drawing from corporate agency, the intra-corporate conspiracy doctrine has roots in antitrust law. In *Copperweld Corp v. Independence Tube*

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Corp., the Court held that a parent and wholly-owned subsidiary could not conspire or combine in violation of § 1 of the Sherman Act because they always "share a common purpose whether or not the parent keeps a tight rein over the subsidiary." 467 U.S. 752, 771 (1984) (noting that the idea of a conspiratorial agreement "between a parent and a wholly owned subsidiary lacks meaning"). Citing the statute's prohibition against any "combination … or conspiracy in restraint of trade[,]" the Court explained that agreements between a parent and subsidiary did not constitute the "concerted activity" Congress intended to prevent because such agreements did not "deprive[] the marketplace of the independent centers of decision-making that competition assumes and demands." *Id.* at 768-69; *see also Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1147 (9th Cir. 2003) ("Section 1, like the tango, requires multiplicity: A company cannot conspire with itself." (citing *Copperweld*, 467 U.S. at 769)).

Congress had the benefit of *Copperweld* when it amended the AKA in 1986, but it said nothing suggesting an intent to depart from the Court's holding. Instead, Congress cited with approval another Supreme Court decision treating companies and their employees and affiliates as a single entity rather than as independent actors. *See* S. Rep. No. 99-435, at 15 (1986) (applying the common law agency principle of vicarious liability in the Sherman Act context to "encourage supervision of agents to deter … misconduct") (referencing *Am. Soc'y of Mech. Eng'rs v. Hydrolevel*, 456 U.S. 556, 572 (1982)). In these circumstances, it would be improper to infer that Congress intended the AKA to apply to intra-corporate conduct because "[t]he normal rule of statutory construction is that if Congress

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intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986).

Courts within and outside this circuit have expressly applied the intra-corporate conspiracy doctrine to the FCA and many other statutes. *See, e.g.*, *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1037-38 (C.D. Cal. 2012) (applying the intra-corporate conspiracy doctrine to the FCA because "the logic of the doctrine comes directly from the definition of a conspiracy" (internal quotation omitted)); *United States ex rel. Fisher v. IASIS Healthcare LLC*, No. CV-15-00872-PHX-JJT, 2016 U.S. Dist. LEXIS 155517, at *56-57 (D. Ariz. Nov. 9, 2016) (collecting FCA cases applying the intra-corporate conspiracy doctrine); *see also W. & S. Life Ins. Co. v. Countrywide Fin. Corp.*, No. 2:11-ML-02265-MRP, 2012 U.S. Dist. LEXIS 184429, at *39-46 (C.D. Cal. June 29, 2012) (reviewing the scope of the doctrine under the laws of various states and applying it to preclude a civil conspiracy claim under Ohio law).[6] Although courts have not yet applied the intra-corporate conspiracy doctrine by name in an AKA case, they have applied the doctrine's core principles. *See, e.g.*, *Morse Diesel Int'l v. United*

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[6] The fact that the Ninth Circuit has not applied the intra-corporate conspiracy doctrine to criminal statutes is irrelevant when considering the application of the doctrine to the parallel civil statute. *See United States ex rel. Huey v. Summit Healthcare Ass'n*, No. CV-10-8003-PCT-FJM, 2011 U.S. Dist. LEXIS 26740, at *20-21 (D. Ariz. Mar. 3, 2011).

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States, 66 Fed. Cl. 788, 799 (2005) (holding that a 50/50 joint venture and one of the two non-majority parent corporations were a single "person" under the AKA).

c. The intra-corporate conspiracy doctrine bars the government's AKA claim.

The government's AKA claim is precluded by the intra-corporate conspiracy doctrine and should be dismissed. A "kickback" requires that "each party to the kickback transaction is acting independently and could choose or could have chosen not to deal with the other." *Patzer*, 2018 U.S. Dist. LEXIS 121604, at *21-22. In the kickback scheme the government has pled, the recipients of the alleged kickback had no such choice; they were LMC employees receiving standard compensation from LMC. The government's theory is inconsistent with "[t]he general rule … that employees cannot conspire with their employer" because the necessary "plurality of actors" is missing. *See Nat'l Flood Servs. v. Torrent Techs., Inc.*, No. C05-1350Z, 2006 U.S. Dist. LEXIS 34196, at *16 (W.D. Wash. May 26, 2006) (citing *Copperweld*, 467 U.S. at 769); *see also Skilling*, 561 U.S. at 413 (holding that a kickback requires a payment to an independent third party).[7]

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[7] The Complaint does not allege that Armijo or any other employees acted to advance a financial interest separate from LMC's. Thus, this case does not fall within a narrow exception to the intra-corporate conspiracy doctrine, recognized by some courts outside the Ninth Circuit, for employees with an "independent personal stake" in the conspiracy. *See, e.g.*, *Hartman v. Bd. of Trustees*, 4 F.3d 465, 470 (7th Cir. 1993). As the government itself has argued, "potential bonuses,

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That the employees in question were seconded to MSA, a joint venture in which LMC was one of three owners, does not change the analysis. The Ninth Circuit has been clear that *Copperweld* extends to a host of corporate structures beyond a parent and wholly-owned subsidiary, including (1) "a company and its officers, employees and wholly owned subsidiaries," (2) "subsidiaries controlled by a common parent," (3) "firms owned by the same person," (4) "a firm owned by a subset of the owners of another," (5) principal-agent relationships," and (6) "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Freeman*, 322 F.3d at 1147-48 (internal citations omitted). The only court to consider the application of the AKA to a non-wholly-owned subsidiary ruled that a 50/50 joint venture and one of the two non-majority parent corporations were a single "person" under the AKA. *Morse Diesel Int'l*, 66 Fed. Cl. at 799.

The government has plainly pled that MSA, LMSI, and LMC were acting as

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promotion, or continued employment" do not constitute an independent personal stake, and the intra-corporate conspiracy doctrine applies even when an employee may have acted outside the scope of his or her employment to pursue financial bonuses or a promotion. *See U-Haul Co. of Nev. v. United States*, No. 2:08-CV-729-KJD-RJJ, 2012 U.S. Dist. LEXIS 103261, at *6 (D. Nev. July 25, 2012) (adopting the government's argument to dismiss an alleged conspiracy between the government and its employees).

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a "single economic entity." *Freeman*, 322 F.3d at 1147 (explaining that "[t]he theme … is economic unity" as indicated by "substantial common ownership" or "an agreement to divide profits and losses"). The Complaint repeatedly alleges that the three entities shared substantial common ownership, that they were "affiliates," and that LMC controlled or had the ability to control MSA and LMSI. *See* Compl. ¶¶ 9, 42, 117, 124 (describing MSA and LMC as affiliates); *see also* 48 C.F.R. § 2.1 (under the FAR, an "affiliate" is any "associated business concerns or individuals if, directly or indirectly (1) [e]ither one controls or can control the other; or (2) [a] third party controls or can control both"). The government also alleges that MSA, LMSI, and LMC had "an agreement to divide profits and losses," and that LMC's ability to earn profit through both MSA's prime contract and LMSI's subcontract led to the alleged FCA violations. *See* Compl. ¶ 37 (alleging the applicability of Clause B.11 prohibiting "the contractor from charging to DOE any additional profit through any subcontracts to any affiliate companies of the contractor except under narrow excepted circumstances"); ¶ 49 (alleging "DOE's Contracting Officer" stated "he would not permit any additional profit to LMSI or LMC on any such subcontract, because LMC was already earning profit on this work through its part ownership of MSA"); ¶ 88 (alleging "LMC, MSA, LMSI, Olsen, and Armijo" understood it was "necessary to have DOE consent to the subcontract as proposed before any of [LMSI's] profit could be realized by LMC"). Accordingly, the AKA claim cannot stand. *See Freeman*, 322 F.3d at 1147 (holding that members of a "single economic entity" "are incapable of conspiring with one another").

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3. The rule of lenity requires narrow construction of the AKA.

Even if the government's AKA claim could survive the *Skilling* and affiliate hurdles, the rule of lenity would preclude liability. The AKA is both a civil and criminal statute. "The rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). Civil AKA claims are subject to the rule of lenity "[b]ecause [a court] must interpret the statute consistently, whether [a court] encounter[s] its application in a criminal or noncriminal context[.]" *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343, 348 (5th Cir. 2013) (applying the rule of lenity to civil AKA claims). The rule of lenity applies if, after considering the AKA's "text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010), *abrogated on other grounds by* Section 102(b)(1) of the First Step Act of 2018, Public Law No. 115-391 (internal quotations and citations omitted). "[W]hen there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60 (collecting cases applying the rule of lenity to narrow criminal statutes); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016) ("[W]e cannot construe a criminal statute on the assumption that the government will 'use it responsibly.'" (quoting *United States v.*

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Stevens, 559 U.S. 460, 480 (2010)).

The rule of lenity forecloses the government's broad construction of the AKA because multiple courts have found the statute—and, in particular, the relevant language in the definition of "kickback"—to be ambiguous. In *Vavra*, the Fifth Circuit pointed to Congress's failure to define the two critical terms in the statutory definition—"improperly" and "favorable treatment." 848 F.3d at 378. The court rejected the government's interpretation that "improperly" means "anything not 'innocent' or 'incidental'" because that construction would not provide "reasonable notice to those in the government-contracting arena as to when their acts are innocent and when they are not." *Id.*

The Northern District of California has likewise applied the rule of lenity to limit "improper[]" conduct under the AKA. *Burger*, 2000 U.S. Dist. LEXIS 22066, at *15 (rejecting as "circular reasoning" "the government's argument that [the] defendant's actions were improper because they constituted a kickback"). In *Burger*, the defendant operated a property management company that agreed to split the management fees it earned from the Department of Housing and Urban Development ("HUD") with property owners in exchange for the right to serve as the managing agent. *Id.* at *2-4. Even though this exchange had many hallmarks of a kickback scheme—including two unaffiliated parties exchanging value—and the Office of Inspector General for HUD had publicly opined that the practice in question was "essentially a kickback scheme," the court applied the rule of lenity because HUD had not taken steps to issue a directive specifically prohibiting the fee-splitting, and the "defendant would have been unable to determine that the

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conduct at issue was 'improper' under the [AKA]." *Id.* at *17-20.

The potential harm resulting from the government's broad construction of the AKA here is far greater than in *Vavra* and *Burger*, where the alleged conduct was much more consistent with a typical kickback. *See Vavra*, 727 F.3d at 345 (explaining that the defendant's subcontract manager had accepted benefits from an unaffiliated subcontractor on at least "ninety-three occasions" and citing benefits ranging from "meals, drinks, golf outings, tickets to rodeo events, baseball games, football games, and other gifts and entertainment"); *Burger*, 2000 U.S. Dist. LEXIS 22066, at *5 (noting undisclosed fee-splitting between unaffiliated entities). In this case, the government is pursuing a novel theory involving employee incentive compensation—an arrangement that the Supreme Court has expressly held is *not* a kickback or a bribe. *Skilling*, 561 U.S. at 413.

The breadth and future implications of the government's theory also counsel in favor of lenity. The government could apply its AKA theory not just to compensation to seconded employees, but to *any* compensation a company paid to *any* employees who engaged in conduct that the government deemed improper and resulted in "favorable treatment" for the company in connection with a government prime contract or subcontract. When faced with a similar situation involving a potentially broad statute—the Computer Fraud and Abuse Act, 18 U.S.C. § 1030—the Ninth Circuit invoked the rule of lenity to adopt a narrow construction and avoid making potential "criminals of large groups of people who would have little reason to suspect they are committing a federal crime." *United States v. Nosal*, 676 F.3d 854, 857-59 (9th Cir. 2012). The same approach is necessary here.

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4. The government's AKA claims fail under Rules 8 and 9(b).

Even if it were legally possible for LMC to pay its own employees a kickback, the government has not alleged particular facts to support a plausible AKA claim. The government's allegations highlight that there was nothing improper about the MICP payments and that there was no link between the payments and the alleged favorable treatment. The Complaint also fails to satisfy Rule 9(b) because it does not plead the AKA claim with the requisite particularity.

a. The government's AKA claim is implausible.

The government fails to establish a reasonable inference that LMC's MICP payments were improper or that the payments were linked to any favorable treatment. *See Vavra*, 848 F.3d at 378 (The AKA "requires a link between the kickback and some benefit being sought or already received."); *see also* 132 Cong. Rec. S16307-01 (Statement of Sen. Levin) (The AKA requires proof of intent "to improperly influence a procurement decision."). The Complaint does not hint at who from LMC might have proposed or agreed to the kickback scheme. It is silent as to who at LMC determined the MICP award and how the amount was calculated. The Complaint merely offers the conclusory assertion that the MICP payments "were kickbacks because they were payments by LMC and LMSI to employees of MSA, a prime contractor, in return for improperly providing LMC and LMSI with favorable treatment relative to the MSA-LMSI subcontract and MSA's contract with DOE." Compl. ¶ 123. Simply calling a transaction a kickback does not make it one. *See Burger*, 2000 U.S. Dist. LEXIS 22066, at *13-14; *see also Iqbal*, 556 U.S. at 678 ("A pleading that offers labels and conclusions

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or a formulaic recitation of the elements of a cause of action will not do." (internal quotation omitted)). Here, the facts the government alleges and the absence of allegations about how LMC awarded MICP compensation doom its AKA claim.

First, the government's allegation that Defendants worked together to maximize LMC profits *years before* the MICP payments in question negates any reasonable inference of a kickback. In the only other case to consider an alleged intra-corporate kickback, the court dismissed the government's AKA claim because the factual allegations contradicted the government's theory that the favorable treatment at issue—also profit on an affiliate subcontract—resulted from the alleged kickback. *See Patzer*, 2018 U.S. Dist. LEXIS 121604, at *22-23. In *Patzer*, the government alleged that a subcontractor provided a kickback to an affiliated prime contractor by agreeing to accept responsibility for certain employee compensation in exchange for a favorable deal on the subcontract. *Id.* at *7-10. The court dismissed the AKA claim under Rule 8 because the government alleged that, as part of a business strategy to increase profits, the common corporate parent decided to use an affiliated subcontractor *before the alleged kickback occurred*. *Id.* at *22-23 (explaining that "it is simply implausible to think that [the prime contractor] could have used anyone other than [the affiliated] subcontractor" because doing so would have eliminated the opportunity for the corporate family to earn profits at both the prime and subcontract levels).

The government's allegations here have the same fatal flaw—the government alleges that LMC intended to seek profit on the LMSI subcontract well before the MICP payments at issue began in 2009. *See, e.g.*, Compl. ¶¶ 41–42, 44

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(alleging LMC was pursuing a strategy to profit on an affiliate subcontract in May 2007); ¶ 123 (alleging kickbacks began in 2009). The only reasonable inference is that any effort to obtain profit on the subcontract resulted from the alleged pre-determined corporate strategy and not from subsequent MICP payments. *Accord Iqbal*, 556 U.S. at 682 (Rule 8 requires sufficient facts to overcome any "obvious alternative explanation."). The government also does not help its cause by alleging that LMC employees began taking actions on MSA's behalf to benefit LMC in 2008, before the MICP payments began, *id.* ¶ 47, and that MSA employees who did not receive MICP payments also took actions benefitting LMC. *Id.* ¶¶ 71–72, 77, 102–03. The government has "plead[ed] [itself] out of court by alleging facts that defeat recovery." *Doe*, 429 F.3d at 708.

Second, the government's AKA claim also fails because it does not allege facts supporting a reasonable inference that LMC's MICP payments were improper. *Accord Vavra*, 848 F.3d at 379 (ordinary meaning of "improper" is "not in accord with … right procedure" (quoting Merriam-Webster's Collegiate Dictionary 626 (11th ed. 2003)); *Burger*, 2000 U.S. Dist. LEXIS 22066, at *15 (citing the legislative history's explanation that Congress included "'improperly' … to ensure that exchange[s] made … for other permissible purposes, such as innocent or incidental favors, are not included under the definition of 'kickback'" and that the legislative history "explicitly leaves open the possibility of other permissible purposes"). Nothing in the Complaint plausibly contends that LMC deviated from its publicly available MICP Plan, which is an objective, standardized method of compensating executives across LMC's various businesses. *See* LMC's

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Motion Requesting Judicial Notice, ECF No. 36, at 5-6; *United States ex rel. Bly-Magee v. Premo*, 333 F. App'x 169, 170 (9th Cir. 2009) (holding that a company does not violate the AKA merely by providing incentives consistent with an established "regulatory regime"). Accordingly, the AKA claim must be dismissed because the government has not alleged any facts to overcome the "obvious alternative explanation" for the MICP payments. *Iqbal*, 556 U.S. at 682.

b. The AKA allegations do not satisfy Rule 9(b).

The government does not adequately describe the "particular misconduct" to enable Defendants to respond and the Court and the parties to fashion manageable limits on discovery. *See United Healthcare Ins. Co.*, 848 F.3d at 1179-80; *Uchytil v. Avande, Inc.*, No. C12-2091-JCC, 2018 U.S. Dist. LEXIS 31737, at *5 (W.D. Wash. Feb. 27, 2018) (explaining enforcement of Rule 9(b) is necessary to ensure claims have "discernable boundaries and manageable discovery limits" (internal quotation omitted)). Specifically, the Complaint is devoid of the necessary "who, what, when, where, and how of the misconduct charged" and the required explanation of why that conduct is a kickback. *See United Healthcare Ins. Co.*, 848 F.3d at 1180 (internal citations omitted).

The Complaint does not identify which MICP payments are at issue. Some allegations suggest that all MICP compensation to all MSA-seconded LMC employees between 2009 and 2015 constituted kickbacks, *e.g.*, Compl. ¶ 118 (alleging payments to "high-ranking MSA employees"), while other allegations suggest the AKA claim is limited to MICP payments to Olsen, Armijo, Eckman, and Ruscitto, *id.* ¶ 123. Rule 9(b) requires that the Complaint provide sufficient

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information for Defendants and the Court to determine the relevant employees and years. *See United States ex rel. Dooley v. Metic Transplantation Lab. Inc.*, No. CV 13-07039 SJO, 2016 U.S. Dist. LEXIS 192400, at *10 (C.D. Cal. June 6, 2016) (holding that Rule 9(b) requires factual allegations regarding the "material aspects" of a kickback scheme, including "the duration of such an arrangement" and "the individuals … who participated").

To the extent the government provides any detail at all on why it believes that MICP payments amounted to kickbacks, it is limited to Armijo's and Olsen's 2011 awards. Compl. ¶¶ 120, 122. The Complaint offers nothing on why payments before or after DOE's conditional consent could be a kickback and says nothing about how the government believes Eckman, Ruscitto, or other unnamed seconded employees "improperly provid[ed] LMC and LMSI with favorable treatment." *Id.* ¶ 123. The government cannot allege that MICP payments to Armijo and Olsen before or after 2011 are kickbacks without explaining *how* those payments violate the AKA. *See United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 372 (5th Cir. 2017) (affirming dismissal of a complaint alleging a violation of the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b, which prohibits payments "in return for" or "to induce" healthcare referrals, because it "never links the alleged carrots to" the specific favorable treatment). Likewise, the government may not claim that other secondees took steps to favor LMC or LMSI without saying *who* took those steps, *what* they did, and *how* those actions were linked to MICP payments. *See id.*; *United States ex rel. Nunnally v. W. Calcasieu Cameron Hosp.*, 519 F. App'x 890, 894 (5th Cir. 2013) (affirming dismissal of an

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AKS complaint because it "does not specify who in particular was involved" or explain "how [the conduct at issue] constituted an illegal kickback"). The government has failed to provide adequate detail for *any* of the alleged kickbacks, but it has provided *no detail at all* for alleged kickbacks aside from Armijo's and Olsen's 2011 MICP awards. The government's entire AKA claim should be dismissed, but failing that, the Court should, at a minimum, limit the AKA claim to MICP payments to Armijo and Olsen in 2011.

C. The Government Fails to Plead FCA Theories with Particularity.

LMC and LMSI join and adopt MSA's motion to dismiss all FCA claims. As explained here, two of the government's FCA theories fail for the additional reason that the Complaint lacks necessary details supporting the government's allegations that some (unspecified) LMSI services and materials were not commercial and that LMSI inflated the cost of some (unspecified) tasks. For FCA claims, Rule 9(b) requires the plaintiff to allege with particularity: "(1) a false statement or fraudulent course of action (falsity element), (2) that is material (materiality element), and (3) made with knowledge of that falsity (scienter element), that causes (4) the government to pay out money." *See United States ex rel. Voss v. Monaco Enters.*, No. 2:12-CV-0046-LRS, 2016 U.S. Dist. LEXIS 86254, at *14-15 (E.D. Wash. July 1, 2016) (citing *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011)).

1. The GSA Schedule allegations do not satisfy Rule 9(b).

The government fails to provide any detail supporting its bare allegation that Defendants misrepresented the commerciality of LMSI's services and materials.

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See, e.g., Compl. ¶ 75 ("[C]ontrary to the representation that all proposed services and items were commercially available, many of the labor categories and all of the materials set forth in the LMSI proposal were not even contained in the LMSI GSA Schedule."). The Complaint does not specify which or how many services were not on LMSI's GSA Schedule. *Compare id.* ¶ 64 (questioning "*some* of the LMSI labor categories") *with* ¶ 75 (questioning "*many* of the labor categories") (emphasis added in both). Without this critical information, it is impossible to determine which of the numerous labor categories covered by the subcontract are at issue, and, by extension, which of the various task orders included such services. *See Bly-Magee v. California*, 236 F.3d 1014, 1018-19 (9th Cir. 2001) (Rule 9(b) requires "particularized supporting detail … specific enough to give defendants notice of the particular misconduct which is alleged." (internal quotation omitted)).

Because of these pleading deficiencies, it is also unclear whether the government intends to argue that LMSI misrepresented that "some" unspecified services and materials were on LMSI's GSA Schedule when they were not, or whether it believes that these services and materials were not commercial at all. Either way, the Complaint lacks the factual predicate necessary to establish that the alleged misrepresentations were material to DOE's decision-making. *See Voss*, 2016 U.S. Dist. LEXIS 86254, at *17 ("[T]he U.S. Supreme Court has reinforced the necessity of pleading facts to support allegations of materiality under Rule 9(b)."") (citing *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)). If the government's allegations relate to the GSA Schedule, then it needed to plead facts to establish how something so "minor or insubstantial" could

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be material. *Accord Universal Health Servs*, 136 S. Ct. at 2003 ("minor or insubstantial" non-compliances are not material). On the other hand, if the government disputes the commerciality of the unspecified services and materials as a general matter, it has failed to plead any underlying facts to support such a claim because presence on a GSA Schedule is not required for goods and services to qualify as commercial under the FAR. *See* 48 C.F.R. § 2.1 (providing that items "customarily used by the general public" and services "sold competitively in substantial quantities in the commercial marketplace" are commercial). And, as the Complaint repeatedly acknowledges, Defendants were clear that LMSI's services were commercial. *See, e.g.*, Compl. ¶¶ 64, 111.

2. The government's allegations about the inflation of fixed price and fixed unit rate tasks do not satisfy Rule 9(b).

The Complaint contains a conclusory assertion that LMSI inflated some fixed unit rates and fixed prices but provides scant detail about how these alleged "schemes" worked. The government complains that LMSI inflated the cost of unspecified rates and prices by using "knowingly inflated FTE [Full-Time Equivalent employee] estimates [] to build up the LMSI fixed unit rates proposed to be charged to DOE." Compl. ¶ 96. The gist of this allegation appears to be that LMSI's internal budgets estimated a lower number of FTEs than LMSI proposed. *Id.* ¶¶ 96-98. But the Complaint does not say what (if anything) any Defendant represented to DOE about the budgets or how LMSI (or any other Defendant) knew that the proposed FTE estimates were false.

The government's use of the word "estimates" underscores a fundamental

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flaw in its allegations. "'Estimate' is a term that, by its very nature, connotes inexactness." *Mowat Constr. Co. v. Dorena Hydro, Ltd. Liab. Co.*, No. 6:14-cv-00094-AA, 2015 U.S. Dist. LEXIS 128058, at *19-20 (D. Or. Sep. 23, 2015); *see also Nev. Rest. Servs., Inc. v. Clark Cnty.*, 981 F. Supp. 2d 947, 957 (D. Nev. 2013) ("Merriam-Webster defines 'estimate' as 'a rough or approximate calculation.'"). The existence of two different "estimates," even if true, does not establish that either figure is unreasonable—only that LMSI came up with two approximations. *Accord United States v. Omnicare, Inc.*, 903 F.3d 78, 92 (3d Cir. 2018) ("[A]n inference of illegality based on facts that could plausibly have either a legal or illegal explanation would be insufficient to meet Rule 9(b)'s burden[.]"). Courts dismiss allegations of fraudulent estimates when complaints merely provide conclusory allegations of fraud paired with "little detail about how the fraud was carried out." *Compare United States ex rel. Berg v. Honeywell Int'l, Inc.*, No. 3:07-cv-00215, 2013 U.S. Dist. LEXIS 89197, at *18 (D. Alaska June 24, 2013), *aff'd in rel. part*, 580 F. App'x 559 (9th Cir. 2014) ("Setting forth which numbers and measurements were wrong and simply using adjectives like 'knowingly' or 'deliberately' to describe those numbers and measurements does not satisfy the heightened pleading standard of Rule 9(b).") *with* Compl. ¶ 96 (alleging LMSI's network services fixed unit rate was "grossly inflated" because LMSI "knowingly used false and inflated FTE estimates").

The government's allegations of double-billing for unspecified union labor, contained in a single paragraph of the Complaint, are even more skeletal. Compl. ¶ 99. The Complaint does not identify what representations (if any) Defendants

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made about the inclusion of union labor in the fixed prices/rates or how those representations were material. Although the government asserts that both LMSI and MSA billed for union labor, it does not allege any facts indicating that LMSI was aware of MSA's billing practices (or vice versa), which also compels dismissal. *Lee*, 655 F.3d at 996-97 (Rule 9(b) requires "sufficient facts to support an inference or render plausible" that the defendant acted "knowingly" because the FCA does not punish "innocent mistakes." (quotation omitted)).

Finally, the government's allegations that LMSI included costs outside its scope of work are also defective. This entire theory is limited to a single paragraph, and the only information provided is that LMSI allegedly inflated prices or rates by "improperly including costs for site services that were not even included in the IR/CM statement of work that LMSI was designated to perform, as well as for site services that were not even provided by LMSI but rather a separate prime contractor." Compl. ¶ 100. The government does not say which fixed prices or rates included these alleged costs, what costs were allegedly outside LMSI's scope of work, or which services another contractor provided. It also fails to identify what representations (if any) LMSI made about these issues or how any alleged misrepresentation is connected to a claim for payment. *See Bly-Magee v. Lungren*, 214 F. App'x 642, 644 (9th Cir. 2006) ("[S]weeping allegations that lack detail" do not satisfy Rule 9(b).).

IV. CONCLUSION

For the foregoing reasons, LMC and LMSI respectfully request dismissal of the government's FCA claims (Counts I and II) and AKA claim (Count III).

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DATED this 23rd day of April, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date listed below, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Executed this 23rd day of April, 2019, at Seattle, Washington.

s/Patti Lane
Patti Lane, Legal Assistant

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